HONG LEONG BANK BHD

v.

WT INDUSTRIES SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: 22-100-2002]
18 MARCH 2005

CIVIL PROCEDURE: *Summary judgment - Triable issues - Banking facilities - Default - Whether bank entitled to review and recall facilities - Claim for outstanding amount - Whether premature and malicious - Whether justified - Rules of High Court 1980 O. 14*

This was an appeal against the decision of the learned registrar granting summary judgment to the plaintiff. The facts were that, by letter dated 30 May 1997, the plaintiff granted several banking facilities to the first defendant, secured upon the second and third defendants' fixed deposits and letters of guarantee. The first defendant defaulted in the repayment and by letter dated 3 May 2000, the plaintiff reviewed the facilities. By the review, the first defendant was allowed continued use of the facilities but upon amended terms and conditions. The first defendant, however, continued to default whereupon the plaintiff recalled the facilities and claimed for the refund of RM356,740.26 due to it under the relevant bankers acceptance. And thus it was that, on 25 July 2003, the learned registrar, finding no triable issues established, entered summary judgment in favour of the plaintiff. In this appeal, the first defendant argued that there were triable issues existing as: (i) the plaintiff had no right to review or recall the facilities; (ii) the plaintiff was estopped from proceeding with the periodic review by reason of the oral promise of the plaintiff's former manager ('Mok'); (iii) the recall of the banking facilities was premature and malicious, and the plaintiff, in so recalling the facilities, was in breach of fiduciary duty and duty of care; and (iv) the plaintiff's pleadings did not clearly show the computation of interest in relation to the said bankers acceptance.

Held (affirming summary judgment):

[1] In the light of the first defendant's default, the natural consequence must be that the plaintiff is entitled to enforce the terms and conditions pursuant to which the facilities has been given, namely to review and recall the facilities. (p. 245 a)

[2] Without condescending to particulars, the allegation relating to Mok's oral promise was a bare allegation, and so does not *ipso facto* bring about any triable issue. The question of calling Mok as a witness did not arise as this was an application for summary judgment which is to be determined by reference to affidavits. (p. 245 h)

[3] The commercial relationship between the plaintiff and the first defendant was founded upon the transactions between a banker and a borrower, and their contractual rights and obligations were governed by the terms and conditions of the facilities. The plaintiff, therefore, owed the first defendant no fiduciary duty or duty of care. Further, no issue of malice could arise as the parties were bound to conduct their banker-borrower relationship in strict accordance with the said terms and conditions. (p. 246 g)

[4] In relation to the review, it is clear that, as at 3 May 2000, the first defendant continued to enjoy the existing facilities. Hence, there was no premature recall of the facilities. On the facts, the court is also unable to uphold the first defendant's contention pertaining to incorrect computation of interest for bankers acceptance. The appeal is clearly devoid of merits and the court would affirm the learned registrar's decision. (pp. 247 d & 248 e-f)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417 ***(refd)***

American Express International Banking Corporation v. Tan Loon Swan [1992] 1 MLJ 727 ***(refd)***

Arab-Malaysian Bank Bhd v. Amalan Tepat Sdn Bhd & Ors [2003] 6 CLJ 306 HC ***(refd)***

Bank Bumiputra Malaysia Bhd, Kuala Trengganu v. Mae Perkayuan Sdn Bhd & Anor [1993] 2 CLJ 495 SC ***(refd)***

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Eushun Properties Sdn Bhd & Ors v. MBf Finance Bhd [1992] 3 CLJ 1519 SC ***(refd)***

Malayan Banking Berhad v. Lim Chee Leng & Anor [1985] 1 MLJ 214 ***(refd)***

Overseas Union Bank Ltd v. Ming Ann Holdings Sdn. Bhd. [1995] 2 CLJ 287 HC ***(refd)***

Standard Chartered Bank v. Menang S K Brothers Enterprise Sdn Bhd & Anor [1993] MLJU 1 442 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 2(2), O. 18 r. 19

Other source(s) referred to:
Paget's Law of Banking, 1989, 10th edn, pp 182, 183

For the plaintiff - Kee Tong Kiak; M/s Chee Siah Le Kee & Partners
For the defendant - Zulhasmi Zakaria; M/s Idris & Partners

Reported by Rose Aziz

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (36) filed by defendant 1 against the decision of the learned registrar who had on 25 July 2003 entered summary judgment in favour of the plaintiff under O. 14 of the Rules of the High Court 1980.

A reference hereinafter to an order and rule is a reference to that order and rule in the Rules of the High Court 1980 unless the context otherwise requires.

Factual Background

The plaintiff's claim against defendant 1 is for:

1. a sum of RM358,937.25 as at 13 May 2002 being arrears under bankers acceptance granted by the plaintiff to defendant 1; and

2. interest at 10.3% p.a. accruing at daily rest on the principal sum of RM300,000 with effect from 14 May 2002 to the date of full realisation.

Vide plaintiff's letter of offer dated 30 May 1997 to defendant 1 ("the letter of offer") which defendant 1 has accepted, and on the basis of the letter of guarantee executed by defendants 2 and 3, the plaintiff gave defendant 1 the following banking facilities:

1. an overdraft against outport cheques for RM80,000; and

2. letters of credit, trust receipt and bankers acceptance for RM300,000.

The repayment and tenure of the aforesaid banking facilities are expressly stated as follows:

Overdraft against outport cheques	-	This facility is subject to periodic review and payable on demand
Letters of Credit	-	sight/90 days
Trust Receipt	-	90 days payable at the end of each period

Bankers Acceptance	-	Up to 90 days but subject to a minimum of 21 days, payable at the end of each period.

Prior to the letter of offer, the plaintiff has given defendant 1 overdraft facility for RM200,000 *vide* letter of offer dated 26 December 1996, which was subsequently increased to RM300,000 *vide* letter of offer dated 13 January 1997, which was again increased to RM400,000 *vide* letter of offer dated 24 February 1997, secured by way of fixed deposit and guaranteed by defendants 2 and 3.

On 13 April 2002, the plaintiff uplifted the fixed deposit amounting to RM434,772.27 on grounds of defendant 1's default.

Bankers acceptances No. 554801 dated 1 March 2000 and 554802 dated 27 March 2000 matured on 23 May 2000 and 22 June 2000 respectively, but defendant 1 had defaulted on these maturity dates, as a result of which the plaintiff *vide* letter dated 26 August 2000 had to reschedule these facilities in order to ensure regularisation by defendant 1.

Defendant 1 *vide* letter dated 15 October 2001 made counter proposals for regularisation. As these counter proposals were not acceptable to the plaintiff, the plaintiff *vide* letter dated 8 March 2002 demanded payment of the outstanding sum.

Vide letter dated 16 April 2002, the plaintiff withdrew the overdraft facility, letters of credit and trust receipt, and claimed a sum of RM356,740.26 due under bankers acceptance as at 15 April 2002. The other facilities have been set off against the fixed deposit.

Plaintiff's Right To Review

Mr. Zulhasmi bin Zakaria, learned counsel for the defendant, submitted that the plaintiff has no right to review the facilities of letters of credit, trust receipt and bankers acceptance, as defendant 1's account has been well maintained, relying on *Bank Bumiputra Malaysia Bhd. Kuala Trengganu v. Mae Perkayuan Sdn. Bhd. & Anor* [1993] 2 CLJ 495 ('Mae Perkayuan').

In response, Mr. Kee Tong Kiak, plaintiff's learned counsel contended that the plaintiff's right to review is contained in the letter of offer and that *Mae Perkayuan*, *supra*, concerns a fixed loan which is distinguishable from the banking facilities herein.

The plaintiff relied on:

1. *Overseas Union Bank Ltd. v. Ming Ann Holdings Sdn. Bhd.* [1995] 2 CLJ 287;

2. *Malayan Banking Berhad v. Lim Chee Leng & Anor.* [1985] 1 MLJ 214; and

3. *Standard Chartered Bank v. Menang S K Brothers Enterprise Sdn Bhd & Anor* [1993] MLJU 1 442.

I shall now consider *Mae Perkayuan, supra*, cited for the defendant.

In *Mae Perkayuan, supra*, *Mae Perkayuan* being desirous of developing certain land in Dungun and Tampin applied to and obtained from Bank Bumiputra ("the Bank") bridging finance operated under an overdraft facility. It was a term of the agreement that interest on all sums disbursed by the Bank was to be capitalized. On *Mae Perkayuan*'s failure to service the interest, the bank withdrew the facility and claimed for the amount outstanding inclusive of interest and costs. *Mae Perkayuan* counterclaimed for damages for breach of the bridging loan agreement. The trial judge found in favour of *Mae Perkayuan*, dismissed the bank's claim and allowed the counterclaim. On the bank's appeal, the Supreme Court through the judgment of Abdul Hamid bin Hj. Omar LP (as he then was) held, *inter alia*, that the bank was not entitled to issue the recall letter purely on the ground that interest had not been serviced by *Mae Perkayuan* because *Mae Perkayuan* was not obliged under the agreement to pay interest during the bridging period.

It is clear to me that the terms of the bridging loan in *Mae Perkayuan, supra*, gave rise to rights and obligations which are largely different from those in the appeal before me.

Further, the nature of the facilities utilised by the defendant does play a significant role in determining the rights and the obligations of the parties herein.

In relation to overdraft, it is necessary to observe that an overdraft is repayable on demand and if the defendant as the borrower has agreed to repay on demand, the plaintiff as the bank has a right to demand full repayment at any time without giving any reason or period of notice: pp. 182 and 183 of *Paget's Law of Banking*, 10th edn. (1989), as applied in *Overseas Union Bank, supra*, at p. 289 a-b per Abdul Aziz Mohamad J (now JCA).

Lee Hun Hoe CJ (Borneo) in delivering the judgment for the Federal Court in *Malayan Banking Bhd, supra*, explained at p. 215 that when a trust receipt matured, it became due and payable, for which no notice was necessary as the writ itself was a notice.

In *Standard Chartered Bank, supra*, Siti Norma Yaakob J (now CJ (Malaya)) defined a bankers acceptance in the following words:

> A bankers acceptance is basically a negotiable bill of exchange drawn on a bank to finance an underlying trade transaction. It is termed "accepted" when the drawee bank signifies acceptance by signing on the bill of exchange. The drawee bank thereby undertakes the obligation to meet payment on the maturity date. On the maturity date the bank has to make payment whether or not the proceeds of the underlying trade bill have been received and irrespective of whether the customer is able to pay.

In my judgment, the rights and obligations of the plaintiff and defendant 1 in relation to the above banking facilities are to be determined by a proper perusal of the letter of offer at p. 69 of encl. (7) which contains the plaintiff's approval of defendant 1's application for the banking facilities subject to the terms and conditions including, *inter alia*, the overdraft against outport cheques being "subject to periodic review and payable on demand", and the bankers acceptance being "up to 90 days but subject to a minimum of 21 days, payable at the end of each period."

Page 3 condition (f) of the letter of offer expressly provides, *inter alia*, as follows:

> (f) The bank reserves the right to recall the facilities if there is any change in the partner's shareholdings and/or management of the company.

Page 5 thereof contains a paragraph on "periodic review" in the following words:

> The bank reserves the right to review the facility at any time and from time to time irrespective of whether or not an event of default has occurred and nothing herein shall be deemed to impose on the bank any obligation either at law or in equity to make or to continue to make available the facility to the Borrower.

Para (b) at p. 8 refers to defendant 1's covenant to provide further security and states:

> The bank may recall/suspend utilisation of the facilities in the event of non-payment of the principal/interest or breach of the borrower of any of the terms of the facilities or upon the occurrence of any event which Bank considers an event of default.

It seems to me that defendant 1's contention runs counter to the above self-explanatory provisions of the letter of offer which, upon being accepted by defendant 1, clearly and unequivocally resulted in a legally binding contract between the plaintiff and defendant 1.

In the light of defendant 1's default as alluded to in the factual background above, the natural consequence is that the plaintiff is entitled to enforce the terms and conditions pursuant to which the facilities has been given by the plaintiff to and utilised by defendant 1, ie, to review and recall the facilities.

Estoppel

It was submitted for defendant 1 that one Mr. Mok Juan Chek ("Mok") has made an oral promise to defendant 1 as a result of which the plaintiff is estopped from proceeding with the periodic review, seeking support in *Mae Perkayuan, supra; Eushun Properties Sdn. Bhd. & 4 Ors. v. MBf Finance Bhd. (formerly known as Malaysia Borneo Finance Corpn. (M) Bhd)* [1992] 3 CLJ 1519. It was also said that Mok should be called as a witness at the full trial.

The plaintiff denied any oral promise made by Mok, as defendant 1 has never raised any such oral promise when the plaintiff demanded payment of the outstanding sums from defendant 1, and that Mok who is now in the plaintiff's branch in Johor Bahru, was the plaintiff's former manager who has been replaced by one Jeya Seelan as the person in charge of defendant 1's bank account.

I am unable to understand the nature and content of the oral promise allegedly made by Mok to defendant 1 in order to assist defendant 1 in invoking the doctrine of estoppel.

Mae Perkayuan, supra, has earlier in this judgment been shown to be unhelpful to defendant 1's contention.

In *Eushun Properties, supra*, the defendants' affidavits asserted that there had been negotiations between the parties therein on the purpose of the loan and the intent of the initial drawdown of the RM1.5 million on a quarterly basis, and that their true arrangement was not reflected in the agreement. With that background, the Supreme Court in the judgment delivered by Mohd Yusoff Mohamed SCJ (as he then was) held that these averments are questions of fact which could not be determined on affidavit evidence alone.

In my view, the instant appeal raises defendant 1's bare allegation relating to Mok's "oral promise" without condescending to particulars, and so does not *ipso facto* bring about any triable issue at all, unlike the facts in *Eushun Properties, supra*. The question of calling Mok as a witness does not arise as this is an application for summary judgment which is to be determined by reference to affidavits under O. 14 r. 2(2) which provides as follows:

> (2) Unless the court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.

So far, there has been no application by defendant 1 to the court for an order to the contrary or for the court to direct otherwise. As the present manager in charge of defendant 1's account in the plaintiff is in a position to affirm an affidavit on behalf of the plaintiff, there is no legal requirement for Mok to be called as a witness.

By way of illustration, in an O. 14 application in *American Express International Banking Corporation v. Tan Loon Swan* [1992] 1 MLJ 727, the Supreme Court in a judgment delivered by Gunn Chit Tuan SCJ (later CJ (M)) held at p. 734A that an in-house lawyer employed by the plaintiff could affirm an affidavit for the plaintiff.

Malice

It was canvassed for defendant 1 that the plaintiff's letter dated 3 May 2000 to review and recall the banking facilities was malicious and unreasonable, and hence a breach of fiduciary duty and duty of care, as it was a premature recall and that the plaintiff had failed to fulfil the request of the Credit Guarantee Corporation ("CGC") in relation to defendant 1's account in United Overseas Bank ("UOB account"). *Arab-Malaysian Bank Bhd v. Amalan Tepat Sdn Bhd & Ors* [2003] 6 CLJ 306; *Mae Perkayuan, supra; and Abdul Rahim bin Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417 were referred to.

For the plaintiff, it was contended that there was no malice on the part of the plaintiff and that the plaintiff did not owe defendant 1 any fiduciary duty or duty of care as the plaintiff and defendant 1 had a banker-borrower relationship, and that it was defendant 1's duty to renew the CGC guarantee for its UOB account which defendant 1 has failed to do; and that there was no premature recall of the banking facilities.

In relation to defendant 1's allegation of malice, breach of fiduciary duty or duty of care, I shall consider the nature of the relationship between the plaintiff and defendant 1. There can be no doubt in my mind that their commercial relationship is founded upon the transactions between a banker and a borrower, as a result of which the parties' contractual rights and obligations are governed by the terms and conditions creating such a relationship, in which the plaintiff obviously owes defendant 1 no fiduciary duty or duty of care. No issue of malice can ever arise as the parties are duty bound to conduct this banker-borrower relationship in strict accordance with the terms and conditions alluded to above.

Apart from that, contemporary documents play an important role in the determination of the existence or otherwise of a triable issue which defendant 1 seeks to raise: *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC.

In relation to the request by CGC, the plaintiff has in fact assisted defendant 1 by responding to CGC's letter dated 17 May 2000 addressed to the plaintiff, in connection with defendant 1's UOB account.

In relation to the review, it is clear to me the plaintiff has *vide* letter dated 26 August 2000 restructured the facilities in favour of defendant 1 and that the plaintiff's letter dated 3 May 2000 provided for:

1. the renewal of the overdraft, letters of credit, trust receipt and the bankers acceptance;

2. quarterly reduction of RM20,000 on the overdraft on outport cheque, commencing three months after Credit Guarantee Corporation approval, until the limit is reduced to zero; and

3. annual reduction of RM50,000 on trade lines commencing six months after Credit Guarantee Corporation guarantee approval.

Hence, as at 3 May 2000, defendant 1 continued to enjoy the existing facilities, which means that there was no premature recall whatsoever.

By contrast, in *Arab-Malaysia Bank, supra*, relied on by defendant 1, several triable issues have been raised, one of which concerns the restructuring of the loan with terms and conditions contained in the plaintiff's letter dated 3 August 1999 creating new rights and obligations which must be read with the original loan agreement which had been amended or modified thereby. Hence, in the circumstances, at p. 312(g), I held that a premature recall of the term loan was a triable issue. The facts there have taken dimensions which are vastly different from those before me in the instant appeal in which there is no premature recall of the facilities granted by the plaintiff to defendant 1.

Mae Perkayuan, supra, requires no further discussion here.

The factual matrix in *Abdul Rahim Bin Abdul Hamid, supra*, covers a wide compass with various applications under O. 18 r. 19 and O. 14. It does not show any similarity of facts with the instant case. The Court of Appeal through the judgment of Mokhtar Sidin JCA reiterated the established principles, *inter alia*, in relation to O. 14 and, on the basis of the complexity of facts there, held, *inter alia*, that no summary judgment should be entered.

Inadequate Particulars In Pleading

It was said for defendant 1 that the plaintiff's pleading did not clearly show the computation of interest in relation to bankers acceptance, relying on *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 FC.

The plaintiff responded that the computation of interest was correct.

My perusal of para. 23 of the plaintiff's statement of claim shows the following statement of account on bankers acceptance:

Principal Sum (RM)	Maturity Date	Late Interest (RM)	Total RM
150,000.00	23.05.2000	30,103.56	180,103.56
150,000.00	22.06.2000	28,833.69	178,833.69

The principal sum was RM300,000.

Para 24(b) thereof, where relevant, pleaded as follows:

> (b) interest at the rate of 10.3% p.a. accrued daily on the principal sum of RM300,000 with effect from 14 May 2002 until the date of full realisation.

The defence of defendant 1 did not specifically deny paras. 23 and 24 of the plaintiff's statement of claim but merely raised a general bare denial of liability in relation to the plaintiff's entire claim.

In any event, the letter of offer has specifically stated the relevant interest as 4% p.a. above the plaintiff's base lending rate, with a provision for variation thereof. *Vide* plaintiff's letter dated 26 August 2000 to defendant 1, it was varied to 3.5% p.a. above the plaintiff's base lending rate. Further, the plaintiff *vide* letter dated 16 April 2002 had notified defendant 1 of the rate as 10.3% p.a.

In the circumstances, I am unable to uphold defendant 1's contention pertaining to incorrect computation of interest for bankers acceptance.

Conclusion

On the foregoing grounds, I hold that this appeal is devoid of merits and is hereby dismissed with costs. Hence, I affirm the learned registrar's decision and make an order in terms of the plaintiff's claim as adumbrated in the factual background above.